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Supreme Court, U.S.
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No. 04-463

IN THE

Supreme Court of the United States

JEAN CO., LTD.,

Petitioner,

v.

ELONEX I.P. HOLDINGS, LTD., *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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DECEMBER 16, 2004

COUNTER STATEMENT OF QUESTION PRESENTED

The District of Delaware held that it had personal jurisdiction over a Taiwanese maker of computer monitors that it found had (1) intentionally placed millions of infringing computer monitors into the stream of United States commerce in established distribution channels that it knew serviced the State of Delaware; and (2) established channels for providing service, repairs and technical assistance to customers in Delaware. The Federal Circuit affirmed summarily.

The question presented is whether the district court found facts sufficient to support personal jurisdiction consistent with the Due Process Clause of the Fifth Amendment.

LIST OF PARTIES

The petition misidentifies the parties to the proceeding in the court of appeals. Petitioner Jean Co., Ltd., was the appellant below, and respondents Elonex I.P. Holdings, Ltd., and EIP Licensing, B.V., were appellees. The remaining entities listed on page ii of the petition were defendants in 21 related cases the district court consolidated with respondents' patent infringement action against petitioner. These entities did not participate in the proceeding before the court of appeals.

CORPORATE DISCLOSURE STATEMENT

Respondent Elonex I.P. Holdings, Ltd., is a wholly-owned subsidiary of the Oakleigh Trust, which has an address of P.O. Box 119, Commerce House, St. Peter Port, Guernsey, GY1 3HB. Respondent EIP Licensing, B.V., is a wholly-owned subsidiary of Elonex plc, which has an address of 2 Aspley Way, London NW2 7LF, England. No publicly held companies hold any stock of respondents.

TABLE OF CONTENTS

Page

COUNTER STATEMENT OF QUESTION PRESENTED i

LIST OF PARTIES ii

CORPORATE DISCLOSURE STATEMENT ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISION INVOLVED 1

STATEMENT 2

1. *Jean Placed Millions of Computer Monitors Into the Stream of U.S. Commerce in Well-Established Distribution Channels Leading to Delaware and Served the Delaware Market for Its Monitors* 3

2. *Despite Prodigious U.S. Monitor Sales, Jean Intentionally Defaulted* 6

REASONS FOR DENYING THE PETITION 10

I. The Federal Circuit's Summary Affirmance in This Case Does Not Conflict With the Minimum Contacts Jurisprudence of This Court or the Decisions of the Lower Federal Circuits 11

II. The Decision Below Was Correct 15

A. Jean's Mistaken Effort at Error Correction Is Not a Basis for Review 15

B. Under Either *Asahi* Stream-of-Commerce Theory, Jean Established Purposeful Minimum Contacts With Delaware 16

C. Rule 4(k)(2) of the Federal Rules of Civil Procedure Is an Alternative Ground for the Federal Circuit's Judgment That Obviates Any Need to Reach the Question Raised in Jean's Petition 19

CONCLUSION 22

TABLE OF AUTHORITIES

Page(s)

Asahi Metal Industry Co. v. Superior Court, 480 U.S. 102 (1987) 10-14, 16-17, 20-21

Barone v. Rich Brothers Interstate Display Fireworks Co., 25 F.3d 610 (8th Cir.), *cert denied*, 513 U.S. 948 (1994) 14-15, 20

Beverly Hills Fan Co. v. Royal Sovereign Corp., 21 F.3d 1558, (Fed. Cir. 1994) 7, 13-14, 21

Boit v. Gar-Tec Products, Inc., 967 F.2d 671 (1st Cir. 1992) 14, 17

Bridgeport Music, Inc. v. Still N The Water Publ'g, 327 F.3d 472 (6th Cir.), *cert. denied*, 540 U.S. 948 (2003) 14, 17, 21

Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985) 18

Dehmlow v. Austin Fireworks, 963 F.2d 941 (7th Cir. 1992) 13

Hanson v. Denckla, 357 U.S. 235 (1958) 11

In re Elonex Phase II Power Management Litigation, 279 F. Supp. 2d 521 (D. Del. 2003) 1

International Shoe Co. v. Washington, 326 U.S. 310 (1945) 18

Kernan v. Kurz-Hastings, Inc., 175 F.3d 236 (2d Cir. 1999) 13

Lesnick v. Hollingsworth & Vose Co., 35 F.3d 939 (4th Cir. 1994), *cert. denied*, 513 U.S. 1151 (1995) 14, 17, 21

Pennzoil Products Co. v. Colelli & Associates, Inc., 149 F.3d 197 (3d Cir. 1998) 13

Renner v. Lanard Toys Ltd., 33 F.3d 277 (3d Cir. 1994) 18

Ruston Gas Turbines, Inc. v. Donaldson Co., 9 F.3d 415 (5th Cir. 1993) 13

Shute v. Carnival Cruise Lines, 897 F.2d 377 (9th Cir. 1990), *rev'd on other grounds*, 499 U.S. 585 (1991) 13

U.S. v. Swiss America Bank, Ltd., 191 F.3d 30 (1st Cir. 1999) 19-20

Vermeulen v. Renault, U.S.A., Inc., 985 F.2d 1534 (11th Cir. 1993) 13

World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980) 11-13

CONSTITUTIONAL PROVISION, STATUTES, AND RULES

U.S. CONST. amend. V 1

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1331 3

28 U.S.C. § 1338(a) 3

35 U.S.C. § 271 3

Fed. R. App. P. 35(b) 15

Fed. R. Civ. P. 4(k)(2). 19-20

Fed. R. Civ. P. 55(a) 6

Fed. R. Civ. P. 60(b). 1

Fed. Cir. R. 36. 14

OPINIONS BELOW

The district court's opinion denying Jean Co. Ltd.'s motion to dismiss is unreported. Pet. App. 1a-8a. The District Court's opinion denying Jean's motion for relief under Rule 60(b) of the Federal Rules of Civil Procedure appears at page A13 of the joint appendix in the court of appeals[1] and is reported at 279 F. Supp. 2d 521 (D. Del. 2003). The Federal Circuit's summary affirmance (Pet. App. 43a-44a) is reported at 97 Fed. Appx. 329 (2004).

JURISDICTION

The Federal Circuit's judgment was entered on May 10, 2004. Jean's petition for panel rehearing and rehearing en banc was denied on July 2, 2004. Pet. App. 45a-46a. Jean misstates the basis for this Court's jurisdiction. This Court has jurisdiction to review the Federal Circuit's judgment under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

Jean misidentifies the constitutional provision at issue in this case. In patent infringement actions, which involve a federal question, the Due Process Clause of the Fifth Amendment to the United States Constitution governs the inquiry into personal jurisdiction. It provides in pertinent part that "No person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V.

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[1] Subsequent page citations to the joint appendix in the court of appeals will appear in the format: "A___".

STATEMENT

Respondents Elonex I.P. Holdings, Ltd., and EIP Licensing, B.V. (collectively, "Elonex") are, respectively, the owner and exclusive licensee of U.S. Patent Nos. 5,389,952, 5,648,799, and 5,880,719 (the "Patents in Suit"). The Patents in Suit disclose apparatuses and methods for reducing the power consumption of a computer monitor by causing circuits in the monitor to shut down when the computer is not in use. The patented technology was adopted as an industry standard, resulting in widespread infringement by the international computer and monitor industry. A164-66.

This is one of 27 patent infringement cases that Elonex filed against over 60 computer and monitor vendors in the District of Delaware in 1998, 1999 and 2001. The defendants included Dell Computer Corp.; Sony Electronics, Inc.; Gateway, Inc.; Compaq Computer Corporation; and Apple Computer, Inc.; as well as numerous Taiwanese, Japanese, and Korean monitor manufacturers. Judge Gregory M. Sleet, to whom the cases were assigned, consolidated the actions filed in 2001 as *In re Elonex Phase II Power Management Litigation.* Every one of these matters has been either settled or resolved by a non-appealable judgment. Elonex has licensed 35 companies under the Patents in Suit with total licenses, settlements, and judgments exceeding $100 million. A10.

Jean, a large Taiwanese monitor manufacturer, sells hundreds of thousands of computer monitors worth millions of dollars into the U.S each

year. Faced with Elonex's patent infringement claims, Jean made a deliberate, tactical decision to refuse to participate in the litigation.[2] A11, A931. When Elonex moved for a default judgment, Jean appeared – two years after the filing of the complaint and 20 months after the entry of default – and claimed that "the complete absence of activity by JeanCo within either Delaware or the entire United States precludes jurisdiction." A703. The district court roundly rejected that contention, found Jean's default and post-appearance litigation conduct to be in bad faith, and entered judgment against Jean after a one-day damages trial. A8, A17. Chief Judge Mayer and Judges Newman and Gajarsa summarily affirmed the judgment one week after oral argument, and the full Federal Circuit denied Jean's petition for rehearing en banc without dissent.

1. Jean Placed Millions of Computer Monitors Into the Stream of U.S. Commerce in Well-Established Distribution Channels Leading to Delaware and Served the Delaware Market for Its Monitors

In 2000, Jean sold over 3.3 million computer monitors worldwide and, in 2001, over 1.7 million monitors. A973. Jean's sales are heavily weighted to the U.S. market. Jean concedes that it sold over

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[2] Jean's Statement of the Case mischaracterizes or entirely omits facts material to consideration of the question presented and misstates the basis for federal jurisdiction in the district court. The district court had original jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1338(a). The provision Jean cites, 35 U.S.C. § 271, creates a cause of action for patent infringement and does not confer jurisdiction.

1.2 million monitors in the U.S. in 2000 and over 700,000 monitors in 2001. A1175. Even after Elonex gave Jean actual notice of infringement in October 2000, Jean continued to sell monitors into the U.S. In all, from November 2000 to December 2002, Jean sold 1,317,697 monitors into the U.S. A1144.

Jean has numerous U.S. customers. In 1995, 1996, 2000, and 2001, for example, Jean sold 1,547,821 monitors to ViewSonic Corporation, 236,955 monitors to IBM, 14,508 monitors to "PGS," 248,840 monitors to "KDS," and 349,239 monitors to "other" customers, for a total of 2,397,363 U.S. monitor sales. A1175. Jean's monitors were sold throughout the U.S., including Delaware. In 1999, one of Jean's largest customers, eMachines, Inc., purchased approximately $54,525,960 worth of monitors from Jean, accounting for 12.94% of Jean's worldwide monitor sales. A803, A806. Of the sales by eMachines, fully 54.8% of revenues were from sales to national chain stores like Best Buy, Office Depot, and Circuit City, all of which have outlets in Delaware. A778. During this period, eMachines purchased monitors from only two vendors – Jean and KDS (which was also a Jean customer). A775, A1175.

Another Jean customer, ViewSonic, also has a well-established retail distribution network throughout the U.S. and in Delaware. ViewSonic monitors are available from Best Buy, Office Depot, and CompUSA, all of which have outlets in Delaware, and from internet retailers such as Amazon.com and Buy.com. For example, ViewSonic

advertised a refurbished Jean monitor, on its website, stating that "displays and projectors are only available through ViewSonic resellers." The website lists no fewer than 10 resellers within a 7.5 mile radius of downtown Wilmington, Delaware. A736, A785-89.

Jean's website – which is in English – confirms that Jean intentionally directs sales to U.S. customers. The website identifies a "USA" sales representative, who can be reached via email. The website touts Jean's "Global Service Centers" and directs Delaware purchasers of Jean monitors to its "East Coast" service facility in nearby New Jersey. Purchasers of Jean monitors can also use Jean's website to download driver software and obtain technical support via e-mail. A792-98.

Finally, Jean specifically designed the power management features of its monitors for the U.S. market and obtained relevant U.S. government certifications. The U.S. EPA's Energy Star® Program provides certifications regarding monitor power consumption, the object of the Patents in Suit. Jean sought and obtained certifications for at least 16 monitors under the program. These certifications are important to U.S. monitor vendors, and Jean covenanted to ViewSonic that all of its monitors sold in the U.S. would comply with the Energy Star® Program. A851. The EPA lists Jean's Energy Star® compliant monitors on its website. A800.

2. Despite Prodigious U.S. Monitor Sales, Jean Intentionally Defaulted

Elonex notified Jean of its infringement on October 25, 2000, and filed suit on February 13, 2001. Over the next two years, Elonex repeatedly contacted Jean to persuade it to participate in the proceedings. Jean was well aware of the litigation and consulted lawyers in Taiwan and California. Despite Elonex's efforts, Jean made a strategic decision not to appear. A934-36, A1245-52.

On June 18, 2001, the clerk entered a default against Jean under Rule 55(a). On June 28, 2001, Jean's California attorney wrote to Elonex requesting a copy of the complaint and stating that "[u]pon our receipt of same, we will immediately evaluate the exposure and accordingly make recommendation to JeanCo." A1247. For nearly two years, however, Jean did not respond. On January 31, 2003, Elonex moved for a default judgment. On February 20, 2003 – twenty months after its default – Jean finally appeared. On March 14, 2003, Jean moved to dismiss for lack of personal jurisdiction. Jean did not deny that its monitors were sold in Delaware. Jean instead claimed that it sold and delivered all of its monitors in Taiwan and that it had little or no understanding of their ultimate destination. A706. In response to Elonex's evidence demonstrating that Jean intentionally sold millions of monitors into the U.S., Jean claimed that it had "no control over the sales patterns of its customers, and has not established a distribution network for its products." A817. Notably, Jean did not challenge, then or at any time, the fact that its monitors were shipped

through the stream of commerce into Delaware. Nor did Jean deny that it had customers in Delaware.

On May 6, 2003, the district court denied the motion to dismiss, applying the Federal Circuit's decision in *Beverly Hills Fan Co. v. Royal Sovereign Corp.*, 21 F.3d 1558 (Fed. Cir. 1994). As we discuss in more detail *infra* at 13-14, *Beverly Hills Fan* is the leading Federal Circuit decision on personal jurisdiction in the stream of commerce context. The case does not adopt the minimum contacts holding of either plurality opinion in *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102 (1987). Here, the district court found that "Jean has, for many years, been the first link in precisely the kind of indirect distribution chain" that the Federal Circuit has "held sufficient to establish personal jurisdiction":

> Specifically, Jean sells its monitors to ViewSonic and eMachines, who in turn distribute Jean's monitors to retailers with Delaware operations. Given ViewSonic's and eMachines' extensive re-seller networks in Delaware and on the Internet, Jean cannot credibly claim it had no inkling that some of its monitors would make their way into Delaware via well-established distribution channels. (A4)

The district court further concluded that Jean's placement of monitors into the stream of commerce leading to Delaware, combined with its "interactive website" and "East Coast" service facility in New Jersey, constituted "purposeful minimum contacts" with Delaware that satisfied the requirements of

both due process and the Delaware long-arm statute. A5-6.

After denying Jean's motion to dismiss, the district court scheduled a hearing on Elonex's motion for default judgment for June 18, 2003. A826. At 3:40 p.m. on June 17, the day before the hearing, Jean filed a brief in opposition and a declaration conceding that "Jean considered with its customers the possibility of the monitors being resold in the United States" and that Jean had paid ViewSonic $1,031,982.96 for infringement of Elonex's patents. The declaration also attached portions of Jean's contracts with ViewSonic and IBM, which clearly showed that Jean knew of the monitors' ultimate destination. A834.[3]

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[3] The 20-page IBM agreement discusses the parties' relationship in great detail and contradicts Jean's earlier contention that all sales were made solely through agreements reached in Taiwan. The contract requires that "all procurement, business and administrative communications" by Jean be directed to an IBM "Business Coordinator" in Charlotte, North Carolina. Jean agreed to indemnify IBM for patent infringement and to litigate disputes in New York courts. A901, A904, A908. The ViewSonic agreement describes an even more extensive relationship involving detailed procedures for ViewSonic to issue purchase orders from the U.S. and for Jean to fill them. Jean is required to "prepare shipping documents in full compliance with United States Customs requirements." A862. Jean undertook broad responsibility for servicing and fixing monitors shipped into the U.S. and agreed to "support and service the Product in all ViewSonic markets as may be designated from time to time." A838. As part of this obligation, Jean committed to maintaining an after-sales support organization and to provide "repair work and after-sales services for the Products locally in North America." A877, A885. Jean agreed to travel to California to conduct a training

Jean participated actively in the June 18 hearing, presenting arguments and cross-examining Elonex's witnesses, though not offering any witnesses of its own. At the close of the hearing, the district court found Jean's default and post-appearance conduct to be in bad faith. A931. On July 8, 2003, the district court entered judgment awarding Elonex $3,630,762 in damages, together with prejudgment interest of $1,479,431.26. Finding that "Jean was aware of Elonex's infringement claim and these proceedings and willfully decided to continue its infringing conduct," the district court also assessed increased damages of $3,617,829. A11-12.

On August 7, 2003, Jean filed a notice of appeal and a motion for relief from judgment under Rule 60(b). Three months after the district court's personal jurisdiction ruling, Jean presented a table of what it contended were "the actual numbers of Jean monitors sold in Taiwan and shipped to the U.S.," including over 300,000 monitors for which Jean refused to identify a purchaser or U.S. destination. A1175. The district court found Jean's "facially meritless" motion to be "clearly another example of continuing bad faith" and ordered Jean and its counsel to pay the attorneys' fees Elonex incurred in responding. A17-18.

On September 29, 2003, Jean appealed the Rule 60(b) denial. On October 10, 2003, the Federal

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session for each release of a new monitor design. A878. Jean agreed to indemnify – and, in fact, paid – ViewSonic for patent infringement. A843.

Circuit consolidated Jean's appeals. On May 10, 2004, after full briefing – and less than a week after oral argument – the Federal Circuit affirmed without opinion. On June 7, 2004, Jean petitioned for rehearing and rehearing en banc, relying on grounds identical to those presented in Jean's pending petition for writ of certiorari. The court did not call for a response to Jean's petition, and on July 2, 2004, the full Federal Circuit denied the petition without dissent.

REASONS FOR DENYING THE PETITION

Jean's petition is not remotely certworthy. Jean first argues that the courts of appeals are split over the meaning of *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102 (1987), and, in particular, the application of what are seen as two different tests for "purposeful availment" in the stream of commerce context. Whatever the extent of any confusion in the other circuits, however, the *Federal* Circuit – which issued the decision that Jean asks this Court to review – has consistently *refused* to take sides with one of the *Asahi* opinions or the other and did not take sides in this case. Indeed, the district court held, and the Federal Circuit agreed, that it had personal jurisdiction because Jean's activities in the District of Delaware met the standards of *both* the *Asahi* opinions. This petition does not present the Court with an opportunity to resolve any putative split.

Jean's second argument is simply this: that the district court committed clear error in finding those jurisdictional facts, and that the Federal

Circuit erroneously blessed the district court's findings. Jean is wrong – very wrong – as the Federal Circuit made clear by summarily affirming. If error correction *ever* warrants this Court's attention, it hardly warrants it here.

I. The Federal Circuit's Summary Affirmance in This Case Does Not Conflict With the Minimum Contacts Jurisprudence of This Court or the Decisions of the Lower Federal Circuits

Jean claims that the Federal Circuit's ruling "*effectively* rejects" the due process requirement that a foreign defendant purposefully establish minimum contacts with the forum state, Pet., at 12 (emphasis added). But it defies common sense to argue that the Federal Circuit abolished the minimum contacts requirement without even issuing an opinion.[4]

Similarly, Jean's allegation that the decision below creates a circuit conflict hinges on a fundamental misinterpretation of the Federal Circuit's and the other courts of appeals' applications of this Court's opinions in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980), and *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102 (1987). In *World-Wide Volkswagen*, the Court held that a

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[4] Jean also claims that the "First, Fourth and Sixth Circuits require a defendant to commit an act purposefully directed to the forum, while other [circuits] do not." Pet., at 7. That, too, is incorrect. All of the lower federal courts require purposeful availment and have since 1958 when the Court held in *Hanson v. Denckla* that "it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State." 357 U.S. 235, 253 (1958).

defendant's forum-directed activity provides clear notice that it should "reasonably anticipate being haled into court there." 444 U.S. at 297. The Court also confirmed (in dicta) that intentional forum-directed activity using the stream of commerce constituted purposeful availment:

> [I]f the sale of a product of a manufacturer . . . is not simply an isolated occurrence, but arises from the efforts of the manufacturer . . . to serve directly or indirectly, the market for its product in other States, it is not unreasonable to subject it to suit in one of those States. . . . The forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State. (*Id.* at 297-98.)

In *Asahi*, the Court divided on the specific requirements for purposeful availment in the stream of commerce context. Four Justices concluded that "[t]he placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State." 480 U.S. at 112 (O'Connor, J.). Justice O'Connor's plurality opinion required additional conduct indicating "an intent or purpose to serve the market in the forum State." *Id.* Four other Justices, however, considered such an additional showing unnecessary:

> The stream of commerce refers not to unpredictable currents or eddies, but to the regular and anticipated flow of products from manufacture to distribution to retail sale. As long as a participant in this process is aware that the final product is being marketed in the forum State, the possibility of a lawsuit there cannot come as a surprise. (*Id.* at 117 (Brennan, J.))

In the 17 years since *Asahi*, the circuit courts have carefully navigated the pluralities' differing stream of commerce theories. Of critical import here is the tack of the Federal Circuit. In *Beverly Hills Fan Co. v. Royal Sovereign Corp.*, 21 F.3d 1558 (Fed. Cir. 1994), the Federal Circuit *declined* to choose one view over another, given the facts of record in that case, because "under either version of the stream of commerce theory, plaintiff made the required jurisdictional showing." *Id.* at 1566. Indeed, most of the other federal circuits have done the same, either by finding that the record satisfies both standards,[5] or by relying on the dicta in *World-Wide Volkswagen*.[6]

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[5] *See Kernan v. Kurz-Hastings, Inc.*, 175 F.3d 236, 244 (2d Cir. 1999); *Pennzoil Products Co. v. Colelli & Assocs., Inc.*, 149 F.3d 197, 207 n.11 (3d Cir. 1998); *Shute v. Carnival Cruise Lines*, 897 F.2d 377, 382 n.3 (9th Cir. 1990), *rev'd on other grounds*, 499 U.S. 585 (1991); *Vermeulen v. Renault, U.S.A., Inc.*, 985 F.2d 1534, 1548 (11th Cir. 1993).

[6] *See Ruston Gas Turbines, Inc. v. Donaldson Co.*, 9 F.3d 415, 420 (5th Cir. 1993); *Dehmlow v. Austin Fireworks*, 963 F.2d 941, 946-47 (7th Cir. 1992); *Barone v. Rich Bros. Interstate*

In this case, the district court expressly applied *Beverly Hills Fan* in concluding that Jean's activities constituted purposeful minimum contacts with Delaware. A4-5. The parties' briefs to the Federal Circuit agreed that *Beverly Hills Fan* was controlling. Oral argument centered on the proper interpretation of that decision. Pet. App. 15a-42a. And while the Federal Circuit saw no need to issue even an unpublished opinion in this case, its summary affirmance undoubtedly relied on *Beverly Hills Fan*. Jean points to a supposed circuit conflict in citing to three circuits that have expressly adopted Justice O'Connor's standard in *Asahi*,[7] but the conflict is not at issue here: a decision finding *both Asahi* standards satisfied is consistent with any view of what the Due Process Clause requires.

The lack of a conflict is particularly clear given the procedural history of this case. The Federal Circuit entered a judgment of affirmance without opinion against Jean under Federal Circuit Rule 36. That rule applies to judgments where "an opinion would have no precedential value." A decision favoring one *Asahi* standard over the other would have created a new precedent in the Federal Circuit, a fact that the panel (which included the author of the *Beverly Hills Fan* opinion)

Display Fireworks Co., 25 F.3d 610, 614 (8th Cir.), *cert. denied*, 513 U.S. 948 (1994).

[7] *See, e.g., Boit v. Gar-Tec Products, Inc.*, 967 F.2d 671, 682-83 (1st Cir. 1992); *Lesnick v. Hollingsworth & Vose Co.*, 35 F.3d 939, 945 (4th Cir. 1994), *cert. denied*, 513 U.S. 1151 (1995); *Bridgeport Music, Inc. v. Still N The Water Publ'g*, 327 F.3d 472, 480 (6th Cir.), *cert. denied*, 124 S. Ct. 399 (2003).

would likely have recognized. Further, Jean petitioned for rehearing en banc. Rule 35 of the Federal Rules of Appellate Procedure limits en banc determinations to situations where (1) "the panel decision conflicts with a decision of the United States Supreme Court or of the court to which the petition is addressed"; or (2) "questions of exceptional importance." Fed. R. App. P. 35(b). Here, the full Federal Circuit considered the precise question that Jean presents to this Court for review and, without calling for a response, denied Jean's petition without dissent. Jean's asserted conflict simply does not exist.

II. The Decision Below Was Correct

A. Jean's Mistaken Effort at Error Correction Is Not a Basis for Review

Lurking beneath Jean's mistaken claim of a circuit conflict is an equally mistaken request for this Court to correct alleged errors by the district court and the court of appeals. This Court, however, should not grant review to correct errors in fact finding.

The petition repeatedly claims that Jean committed no act purposefully directed to Delaware and that the courts below relied "solely" on Jean's knowledge that its products would enter Delaware through the stream of commerce. Pet., at 5, 6, 9, 11. The district court's express findings – affirmed on appeal – contradict these assertions. In addition to finding that Jean intentionally placed its monitors into established distribution channels leading to

Delaware, the district court found that Jean's "interactive website" and "East Coast" service facility constituted "purposeful minimum contacts with Delaware." A4-5. The Federal Circuit concurred in those findings of fact. Jean's unsubstantiated challenge to those findings hardly warrants review by this Court.

B. Under Either *Asahi* Stream-of-Commerce Theory, Jean Established Purposeful Minimum Contacts With Delaware

In any event, the decision below is correct. The Federal Circuit affirmed the district court's conclusion that Jean's activities constituted "purposeful minimum contacts with Delaware." A5-6. The record fully supports this determination and satisfies both *Asahi* stream of commerce theories.

Jean's petition concedes, as it must, that the record satisfies Justice Brennan's plurality opinion. Pet., at 6-7. Jean sold millions of monitors to eMachines, ViewSonic, and other U.S. companies, who then re-sold the monitors throughout the U.S. EMachines and ViewSonic distributed Jean monitors to large retailers with outlets in Delaware. These Delaware retailers, in turn, sold the monitors directly to Delaware consumers. Pet., at 6-7; A778, A785-88. Both eMachines and ViewSonic offered to sell the monitors throughout the U.S. via their internet websites. A787-91. Jean was well aware of the regular and anticipated flow of its products from manufacture to distribution to retail sale in Delaware. A4.

The record also amply supports the conclusion that Jean's conduct evidenced "an intent or purpose to serve the market in the forum State" under Justice O'Connor's plurality opinion. 480 U.S. at 112. Jean's interactive website and its affirmative decision to provide repairs and technical assistance to its Delaware customers through an "East Coast" service center show that Jean intentionally "establish[ed] channels for providing regular advice to customers" in Delaware. *Id.* Jean's contract with ViewSonic, moreover, affirmatively obligated Jean to "support and service the Product in *all* ViewSonic markets," A838 (emphasis added), and Delaware is a ViewSonic market, A785-87.[8]

Most telling, however, is what Jean did *not* say at any point in the litigation – which is that it did not have any Delaware customers. Jean refused to identify the purchasers or ultimate U.S. destinations for 300,000 monitors that it admitted infringed the Patents in Suit. A1175. Jean *never* denied Elonex's allegation that its monitors were sold in Delaware. The district court justifiably concluded

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[8] On this record, even the circuit courts on whose decisions Jean relies would find purposeful conduct directed to Delaware. *See Boit*, 967 F.2d at 683 ("There is no evidence in the record that Gar-Tec . . . established channels for providing regular advice to customers in Maine . . . ."); *Lesnick*, 35 F.3d at 947 ("[T]he result might be different if Hollingsworth & Vose had . . . set up a customer relations network [for Maryland]."); *Bridgeport Music*, 327 F.3d at 480 ("Bridgeport does not assert that NTW entered into a distribution agreement with RAL or any other party that placed an affirmative obligation upon the third party to distribute NTW's compositions in Tennessee or elsewhere.").

that Jean was less than candid about its U.S. and Delaware contacts. A16-17.

This is simply not a case in which a hapless, foreign company sold a few products to someone overseas and was then terribly surprised to find that its wares had been shipped to the U.S. There is nothing "random, fortuitous, or attenuated" about Jean's contacts with Delaware or the possibility Jean would be sued there. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985). Indeed, Jean's infringing conduct continued unabated even after Elonex gave Jean actual notice of its infringement and this litigation in October 2000. A733-34. Jean paid over $1 million for royalties and legal fees on an indemnity claim from ViewSonic regarding the Delaware litigation. A914-15. Jean cannot honestly claim it had no fair warning that its activities might subject it to litigation in Delaware.

Jean believed, erroneously, that it could immunize itself from personal jurisdiction and patent infringement claims by selling its monitors free on board Taiwan. That, of course, has not been the law since this Court decided *International Shoe* in 1945.[9] As the district court and the court of appeals

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[9] *See International Shoe Co. v. Washington*, 326 U.S. 310, 314, 320 (1945) (sales "f.o.b. from points outside Washington" sufficient to support personal jurisdiction); *see also Renner v. Lanard Toys Ltd.*, 33 F.3d 277, 282 (3d Cir. 1994) ("Nothing in Justice O'Connor's plurality opinion [in *Asahi*] suggests that the fact that a foreign manufacturer or seller rids itself of title by a sale F.O.B. a foreign port is enough to insulate that manufacturer or seller from jurisdiction if there is the other type of activity to which the plurality opinion referred.").

correctly concluded, Jean established purposeful minimum contacts with Delaware.

C. Rule 4(k)(2) of the Federal Rules of Civil Procedure Is an Alternative Ground for the Federal Circuit's Judgment That Obviates Any Need to Reach the Question Raised in Jean's Petition

Finally, Jean's dubious claim of its "complete absence . . . within either Delaware or the entire United States," A703, provides another reason to deny the petition. As Elonex argued before the court of appeals, even if the court were to conclude that Jean did not have minimum contacts with Delaware, personal jurisdiction nevertheless exists under the federal long-arm statute, Rule 4(k)(2) of the Federal Rules of Civil Procedure. Under Rule 4(k)(2):

> If the exercise of jurisdiction is consistent with the Constitution and laws of the United States, serving a summons or filing a waiver of service is also effective, with respect to claims arising under federal law, to establish personal jurisdiction over the person of any defendant who is not subject to the jurisdiction of the courts of general jurisdiction of any state.

This provision applies if (1) the case arises under federal law; (2) the foreign defendant lacks sufficient contacts with any single state to subject it to jurisdiction there; and (3) the foreign defendant has sufficient contacts with the U.S. as a whole to satisfy due process. *See U.S. v. Swiss Am. Bank,*

Ltd., 191 F.3d 30, 38 (1st Cir. 1999). Here, this patent infringement action arises under federal law. Jean's claimed "absence" from "Delaware or the entire United States" satisfies the second requirement. And Jean plainly has constitutionally sufficient minimum contacts with the U.S. as a whole, by reason of (1) its admittedly substantial and regular annual sales of hundreds of thousands of monitors worth millions of dollars to U.S. companies; (2) its maintenance of training and repair personnel and facilities in the U.S. pursuant to contracts with IBM and ViewSonic; (3) its power management certifications from the E.P.A.; (4) its million-dollar indemnification payment to ViewSonic; and (5) its interactive English-language website, which is accessible throughout the U.S. Given its extensive monitor sales and other activity directed toward the U.S., Jean could reasonably have anticipated "being haled into Court [in the U.S.]." *Asahi*, 480 U.S. at 119.

Thus, even if Jean's contacts with Delaware were somehow wanting, Rule 4(k)(2) obviates any need for the Court to reach the question raised in Jean's petition. This case presents precisely the kind of situation that Rule 4(k)(2) was intended to address: a foreign company with millions of dollars in annual U.S. sales seeking to escape liability for violations of federal law on a jurisdictional technicality.

* * * *

Jean urges the Court "to affirmatively answer the question left open . . . in *Beverly Hills Fan*."

Pet., at 7. The decision below leaves that question open, which is why this Court has no occasion now to answer it. In any event, the question has been open for ten years. And in the last ten years, the current Justices of the Court have denied certiorari at least three times in cases squarely presenting questions about the proper application of stream of commerce theory. *See, e.g., Bridgeport Music, Inc. v. Still N The Water Publishing*, 540 U.S. 948 (2003); *Lesnick v. Hollingsworth & Vose Co.*, 513 U.S. 1151 (1995); *Hosoya. Fireworks Co., v. Barone*, 513 U.S. 948 (1994). Whatever reasons the Court had for denying certiorari in those cases – with full records and explanatory appellate opinions – are magnified in this case, with a record plainly satisfying both *Asahi* plurality opinions, no appellate opinion, and a defendant whose conduct the district court repeatedly found to be in bad faith.

CONCLUSION

The petition for writ of certioriari should be denied.

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